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Supreme Court of the United States

October Term, 1974

No. 74-319

TERESA NATALE MARSHALL and
JAMES LEE VERDON,
Petitioners,

v.

THE CITY OF SEATTLE,
Respondent.

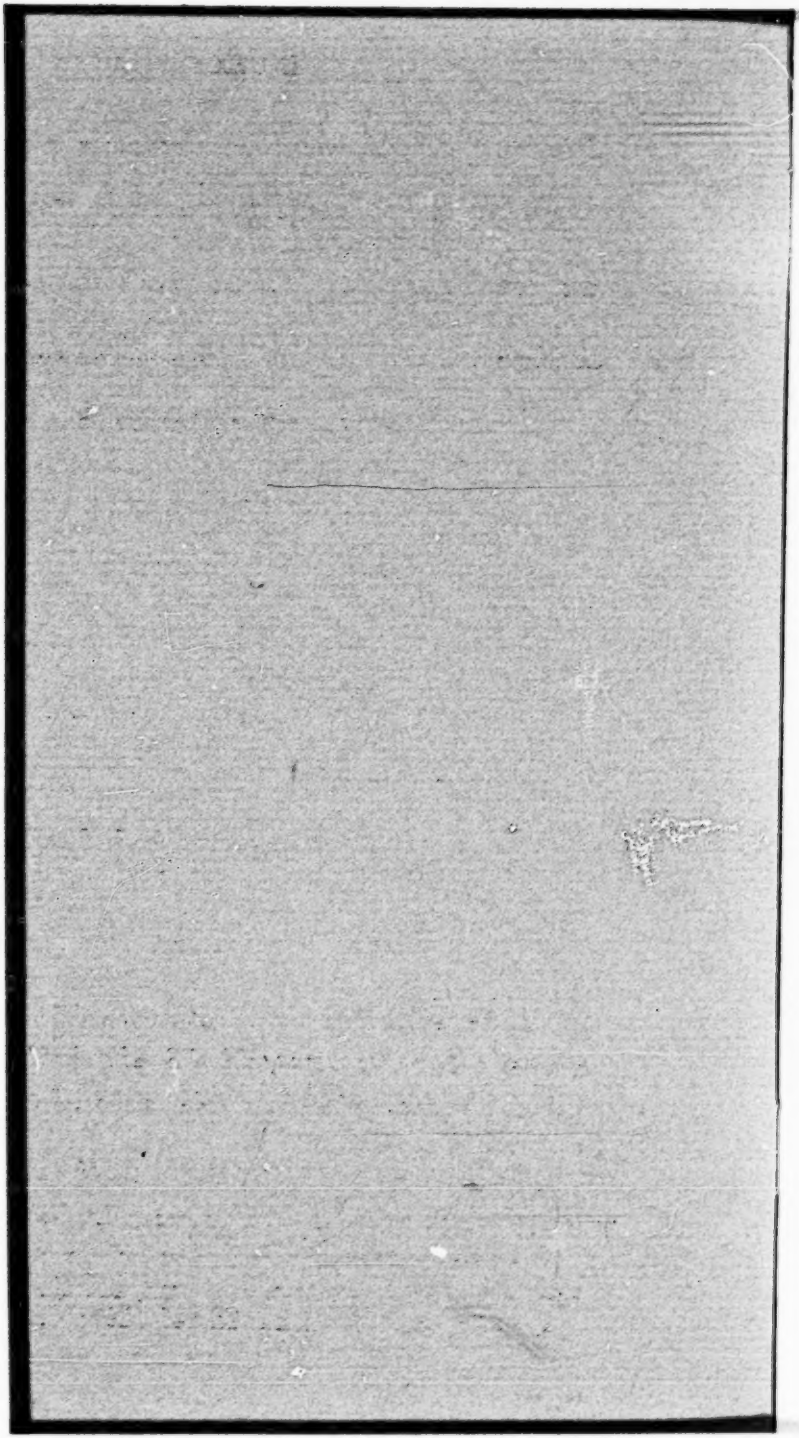
APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOHN P. HARRIS
Corporation Counsel
Attorney for Respondent

Office and Post Office Address:
10th Floor Seattle Municipal Bldg.
Seattle, Washington 98104
Telephone: 583-2338

CRAFTSMAN & MEY PRESS SEATTLE, WASHINGTON



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Respondent, The City of Seattle (hereinafter "Seattle") submits this brief in opposition to the petition of Teresa Natale Marshall and James Lee Verdon for a writ of certiorari.

I.

QUESTIONS PRESENTED

The petitioners have presented three questions for review.

1. Is it constitutional under the First and Fourteenth Amendments for a state to apply a criminal

ordinance prohibiting nudity in public to a performance on a stage in a theatre?

2. Does a finding by a state court that a burlesque strip-tease dance is obscene violate the First and Fourteenth Amendments?

3. Does it violate the due process clause of the Fourteenth Amendment for the Supreme Court of Washington to affirm the convictions of petitioners upon the basis of the conclusion by that Court that the subject performances were obscene when petitioners had never been charged with or tried for violating an obscenity law?

COUNTERSTATEMENT OF THE CASE

A.

Additional Facts

This action was commenced on December 7, 1971 at or around 10:40 p.m. when Seattle Police Officer Geiser observed Teresa Natale Marshall on the stage of the New Paris Theatre, 512 Second Avenue in Seattle, Washington. The police officer observed Petitioner Marshall perform a "strip-tease" dance whereby Petitioner removed all her clothing until she was naked. While naked, Petitioner then spread her legs apart exposing her private parts to the audience, then she laid upon her back and simulated a sex act with "bump and grind" motions.

On February 4, 11, and 12, 1972 and March 9, 1972 Seattle Police Officers observed other naked women on the stage of the New Paris Theatre who also undressed until they were naked. While naked they also spread their legs apart and exposed their private parts to the audience of between 30-50 persons. They then simulated sex acts while

on their backs and then on their stomachs on the floor of the stage, or on a large padded stool that was on the stage. They also somersaulted and landed with their legs spread toward the audience and exposed their private parts to the audience while sitting on the edge of the stage two feet from a largely male audience.

On the above dates James L. Verdon was the manager of the New Paris Theatre. He was responsible for hiring all the women performers and counseling them as to when to wear their G-strings, when to appear naked during a performance, and about their actions generally while performing on the stage.

The advertisement outside the New Paris Theatre on the above dates consisted of a sign outside the theatre stating "Girls, Girls, Girls, Topless, Bottomless, Totally Nude" and photographs of girls wearing bikini type bras and panties. The New Paris Theatre admits the general adult public to any of its performances upon payment of a monetary fee.

The Petitioners were convicted in Seattle Municipal Court and appealed to the Superior Court for King County, Washington, for a trial *de novo*. The case was tried to the court without a jury. The Court found Teresa Natale Marshall guilty beyond a reasonable doubt of violating Seattle Ordinance 16046, Section 21, as amended. The Court also found James L. Verdon was guilty beyond a reasonable doubt of violating Seattle Ordinance 16046, Section 21, as amended by 89022, by aiding and abetting said ordinance's violation, in that the actions Petitioner Verdon counseled the women to perform were lewd and obscene conduct and not constitutionally protected speech.

ARGUMENTS

It is submitted that the decision of the Supreme Court of the State of Washington sustaining petitioners' convictions for engaging in lewd and obscene conduct on the stage of an establishment known as the "New Paris Theatre" and for aiding and abetting said act and other repeated violations is entirely correct, *Seattle v. Marshall,* 83 Wn.2d 665, 521 P.2d 693 (1974).

Petitioners were convicted of violating Seattle Ordinance 16046-21 (as amended) which states:

> "It is unlawful for any person to appear in a state of nudity, or in any indecent or lewd dress, or make any indecent exposure of his person, or to expose his private parts to public view, or be guilty of any lewd act or behavior in any place exposed to public view."

Petitioners do not dispute the facts.

Since a theater is a public place, *Paris Adult Theatre I et al. v. Slaton,* 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973) and since petitioner Marshall was nude, exposed her private parts, and simulated a sex act in front of an audience of 30-50 people in a theater, thereby engaging in obscene conduct, she violated Ordinance 16046-21. Petitioners' actions were conduct not protected as speech, *U.S. v. O'Brien,* 391 U.S. 367, 20 L. Ed. 2d 672, 85 S. Ct. 1673 (1970), and Ordinance 16046-21 applied to them at the time and place alleged in the complaint. Additionally public nudity, and exposure of private parts and publicly simlulating sex acts are obscene per se and meet the tests for obscenity set out in *Miller v. California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). Because this conduct was obscene it is not protected by the First Amendment and Ordinance 16046-21 applied to petitioner at the time and place specified in the complaint.

Petitioner Verdon hired the performers, managed them and counseled them to publicly remove their clothes, expose their private parts and simulate sex acts before an audience, and his conduct comes within RCW 9.01.030 which states:

> "Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him."

and Seattle Ordinance 16046-60 which states:

> "The word 'person' wherever used in this chapter, when necessary means and includes natural persons of either sex, associations, copartnerships or corporations, whether acting by themselves or by servant, agent or employee; the singular number shall, when necessary, include the plural and the masculine pronoun include the feminine."

Addressing, generally, petitioners' first two questions presented, the Washington State Supreme Court held in *Seattle v. Marshall, supra,* 671:

> "The arguments of the defendants that their performances are protected by First Amendment rights need not be considered if it is determined that they were obscene. Obscenity is not protected by the First Amendment. *Roth v. United States,* [354 U.S. 476, 77

S. Ct. 1304, 1 L. Ed. 2d 1499 (1957)], and reaffirmed in *Miller v. California, supra. See also State v. J-R Distributors, Inc.*, [82 Wn.2d 584, 512 P.2d 1049 (1973)].

> "The defendants argue extensively, however, that a theatrical performance is protected by the First Amendment as it is in verbal communication. This may be true in the context of a performance communicating a purpose, philosophy or idea (as long as it is not obscene), but there is no possible analogy of a theatrical performance to the conduct that occurred on the stage of the New Paris Theater that was devoid of any plot, and had no purpose whatsoever than to appeal to a sex-oriented prurient interest of an adult male audience."

In regard, specifically, to Petitioners' first question presented, they have failed to state a proper ground for review by this court since the state court judgment is based on a non-federal ground of ordinance construction. This Court has consistently held that it will ordinarily accept the construction given state statutes or ordinances in local courts. *Baggett v. Bullitt*, 377 U.S. 360, 12 L. Ed. 2d 377, 84 S. Ct. 1316 (1964); *A.F.L. v. Watson*, 327 U.S. 582, 90 L. Ed. 873, 66 S. Ct. 761 (1945). Where a state law is admitted to be valid and the only question is whether it has been correctly construed, this court has no jurisdiction. *Commercial Bank v. Buckingham*, 46 U.S. 317, 5 How 317, 12 L. Ed. 169 (1847); *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 28 L. Ed. 822, 91 S. Ct. 1400 (1971). Since obscenity does not fall within the protection of the First Amendment, the overbreath doctrine is not applicable. *Plummer v. Columbus*, 414 U.S. 2, 38 L. Ed. 2d 3, 94 S. Ct. 17 (1973) (Justice Powell dissent).

Although the petitioners' second question presented may present a substantive federal question, that issue was de-

termined by the Washington State Supreme Court in accordance with applicable decisions of the United States Supreme Court.

In *California v. LaRue*, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342, rehearing denied (1973), a case involving the power of the California Liquor authorities to revoke liquor licenses in those places that provided among other things live entertainment featuring "gross sexuality," this Court stated:

> "But as the mode of expression moves from the printed page to the commission of public acts which may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression which is directed to the accomplishment of an end which the State has declared to be illegal when such expression consists in part of 'conduct' or 'action.' *Hughes v. Superior Court*, 339 U.S. 460 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949). In *O'Brien, supra*, the Court suggested that the extent to which 'conduct' was protected by the First Amendment depended on the presence of a 'communicative element,' and stated:
>
> > 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea. 391 U.S., at 376.'
>
> "The substance of the regulations struck down prohibit licensed bars or nightclubs from displaying, either in the form of movies or live entertainment 'performances' which partake more of gross sexuality than of communication."

This Supreme Court has also recently decided four other cases with applicability to this issue. *Miller v. California, supra; Paris Adult Theater I, et al. v. Slaton, supra; U.S. v. Orito*, 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); *U.S. v. 12, 200-ft. Reels of Super 8 mm Film*

et al., 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973). In the above cases, this Court was careful to emphasize the greater power of the States to regulate live performances.

In *Miller, supra*, 413 U.S. at 25-26, this Court observed:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places."

And this Court continues its explanation of this statement in footnote 8:

> "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), a case not dealing with obscenity, the Court held a State regulation of conduct which itself embodied both speech and nonspeech elements to be 'sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"

Therein it was also noted:

> ". . . to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. It is a 'misuse of the great guarantees of free speech and free press . . .' *Breard v. Alexandria*, 341 US, at 645, 95 L Ed 1233, 35 ALR2d 335. The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of

> the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people,' *Roth v. United States, supra,* at 484, 1 L Ed 2d 1498 (emphasis added). See *Kola v. Wisconsin,* 408 US, at 230-232, 33 L Ed 2d 312; *Thornhill v. Alabama,* 310 US, at 101-102, 83 L Ed 1093. But the public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter."

In *Paris Adult Theater I, supra,* 413 U.S. at 67, this Court stated:

> "Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theatre stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

As the above citations of authority illustrate, conduct that can be validly prohibited on a public street does not become automatically protected merely because it is done on a live theater stage.

As the Washington State Supreme Court observed:

> "That the performance in the New Paris Theater was obscene is further supported by the case of *Adams Theatre Co. v. Keenan,* 12 N.J. 267, 275, 96 A.2d 519, 523 (1953), wherein Justice Brennan described a class of burlesque to be *obscene,* which clearly encompasses the facts of the instant case:
>
> " 'In contrast, that which has been termed "modern burlesque" has been described as
>
> " ' " *a plotless musical entertainment consisting of a series of unrelated episodes and dances, all with the purpose of depicting or suggesting sexual subjects or objects.* The one outstanding charteristic of mod-

> ern burlesque is the fact that it is completely sex-centered. It has some low comedy and occasionally some humor but the principal subject of both is sex. ° ° ° the *piece de resistance* is the girl who disrobes, partially or entirely, and this act varies with the political season and the locality. ° ° ° If burlesque of today is metropolitan, so also it is vice, and needs to be thought of in that light, as an aspect of social pathology. If vice implies a sense of antagonism toward existing mores, a purveying of sex in a vicarious, professional and promiscuous fashion, then burlesque is just that. ° ° ° Although the operator may not be willing to say so to an inquirer, usually adopting a sanctimonious air, he knows, and everything in his theatre indicates he knows, that he is giving a sex show, sans excuses, sans philosophy and above all, sans clothes. He is, in that sense a professional purveyor of sex.' *Dressler, Burlesque as a Cultural Phenomenon* (1937).
>
> *"A burlesque show answering the latter description may well be considered outrightly lewd and indecent.* (Italics ours.)"

In answer to the petitioners' third question presented, they have again failed to state a proper grounds for review, since the state court judgment is based on a non-federal ground of ordinance construction. Construction of an ordinance by a state court is a ruling on a question of state law that is binding on this court as though the precise words had been written into the ordinance. *Terminiello v. Chicago,* 337 U.S. 1, 93 L. Ed. 1131, 69 S. Ct. 894 (1948). The state court in its decision has construed lewd to mean obscene. 83 Wn.2d 665 at 672, 521 P.2d 693 at 697 (1974). This court therefore should adopt such reasonable interpretation of the ordinance as removes it farthest from possible constitutional infirmity *Kovacs v. Cooper,* 336 U.S. 77, 93 L. Ed. 513, 69 S. Ct. 448 (1949).

CONCLUSION

The questions presented in Petitioners' brief involve either a construction of local legislation which is beyond the jurisdiction of this court to construe or an issue which has already been determined by the State Supreme Court in accordance with applicable decisions of this Court. This petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

JOHN P. HARRIS
Corporation Counsel
Attorney for Respondent